Transcript of September 28, 2004 L.A. Liversidge Presentation to ODAP Chair Brock Smith, Toronto

Introduction

My name is Les Liversidge. I'm a lawyer. My practice focuses almost exclusively on workplace safety and insurance issues. I've been in this business for in excess now of thirty years in several different capacities. The comments which I'm going to present to you today are my own based on my observations, and my opinions formed during that thirty plus year career which occurred during a time of tremendous structural reforms of the Ontario Workplace Safety and Insurance system.

I have two audiences here today. I have yourself, Mr. Smith and the WSIB; I also have an audience of employers generally. In front of you I've placed two documents. One a newsletter I wrote last June under the name "**The Liversidge *e*-Letter**" which is a usual regular communication I have with my clients and one dated today. As we are speaking, the one dated today is being transmitted to thousands of employers across the province so that this message gets to those who need to hear it.

Bold change is needed

My basic message is one of change. Change is needed. Bold change, in my respectful view, is needed. Having said that, I begin with a cautionary comment that the Workplace Safety and Insurance Board should not tinker with occupational disease adjudication policy. The goal you are seeking will elude you. Fairness to workers and to employers can only be achieved if the law itself is changed. Let me begin with a very clear statement.

Compensating occupational disease is not a debate about creating cost. The costs exist.

Compensating occupational disease is a debate about <u>who absorbs those costs, the employers directly or collectively, workers directly or collectively or society at large</u>.

The Occupational Disease Advisory Panel, I'll used the short form ODAP from here on in, is not the first attempt to resolve the occupational disease dilemma.

There have been several inquiries and reports addressing this very issue and which are introduced to you in the presentation in which I participated yesterday. I will not repeat those comments which are outlined in the two papers.

ODAP not the first attempt to "fix" occupational disease

The two most influential commentaries though arise from the work of Professor Paul Weiler in the early 1980s and the work of the Ministry of Labour Task Force in the early 1990s. Almost a century a quarter century ago, Professor Paul Weiler released his first very influential report, which, as most people know, set out the policy architecture for two of the most influential changes and reforms of the Ontario Workplace Safety and Insurance scheme since its inception early last century.

Weiler

Weiler's report is remarkable in both its thoroughness and its simplicity. Complex issues which had plagued the system literally for decades and which appear to be without resolution were distilled into workable policy concepts capable of swift implementation. He addressed every leading issue facing the system at that time, including the then, and now, perpetual dilemma of compensation for occupational disease.

Weiler readily recognized however why an occupational disease policy solution eluded the system. He observed that the Ontario workers' compensation system was essentially established for compensation arising from traumatic injury, for which the requirement to establish an employment causal connection was consistent with the funding arrangements. A 100% funded system funded by employers for injury arising out of the employment made sense, was internally consistent, and workable.

In the case of occupational disease however, where the cause of the disease was, in most instances, at best uncertain, the system no longer maintained the same internal consistency. The need to establish an employment causal link, essential in a 100% employer funded regime, was recognized by Weiler to be an impossible task.

In light of the potential non-occupational links to disease, or more precisely in the absence of evidence showing a clear occupational connection, Weiler recognized in his very first report that the policy problem centred on the need to establish causality – the very issues the ODAP continues to address. In his second report, three years later and now more than twenty years ago, Weiler addressed the very issues the ODAP was recently asked to investigate. In fact, the core policy questions have not changed at all over the last twenty-five years.

Fair adjudication of OD claims is impossible as long as causality is the issue

The reason for this remains abundantly clear, and clearer as time goes forward. The fair adjudication of occupational disease cases will remain an impossible task so long as causality is an issue. That simple reality remains ever present today.

Ten years after his second report, which I will call "Weiler II", the irresolvable dilemma of occupational disease continued. The then Minister of Labour struck a tripartite task force with essentially the identical mandate as that of the ODAP. The same theme in that task force report as we saw in Weiler's reports persisted. Fairness cannot be achieved without changing the law.

The issue is ultimately one of funding, not the absence of an adjudication test for entitlement. The 1993 Task Force Report concluded that the system cannot be changed by changing the interpretation of the Act without, changing the Act. These words, more than ten years later, still ring loud and true.

If all that was needed to crack the occupational disease nut was a better legal test, surely such a test would have emerged with Weiler I, with Weiler II, with the 1989 Ison Report

or the 1993 Task Force Report or during the legislative debates, committee hearings and submissions throughout the 1980s and the 1990s. It didn't.

Athey is not a "magic bullet"

Actually, when attention has been focused on the legal test for entitlement, remarkable consistency over time is noted. The 1993 Task Force drew the same essential conclusions as that of the ODAP, even before the "*Athey"* case, yet no "magic bullet" has ever been produced. The same core issues persist today. At the end of the day, under the current system, a linkage between employment exposure and the disease must be established on the balance of probability. The problem remains as simple and as complex as that. There is no legal short cut.

Much stock has been placed on the "*Athey*" decision and I'll just spend a couple of moments to address that, as if "*Athey*" somehow is the long-lost key to unlock the elusive occupational disease door. It doesn't. I'm sensitive to the desire to seek out and discover a new legal method that makes sense of a century of legal discovery.

The legal equivalent of Archimedes' cry of "Eureka!" though, I respectfully suggest, is quite premature. Firstly, the principles enunciated in "*Athey*" were set out almost in the precise same way in the Task Force Report. Secondly, "*Athey*" itself is of limited use. Except in the most general way, it provides no great legal insight into the question of employment causation of occupational disease. "*Athey*", let us not forget, was a motor vehicle tort case – a classic "accident" type case. In fact, under the workplace safety and insurance system, "*Athey*" type cases have been adjudicated in a like way of "*Athey*" well before "*Athey*", in fact, decades before "*Athey*", for and least the last thirty or forty years.

In this respect the workplace safety and insurance system was well ahead of the Supreme Court of Canada in establishing principles of causation. It is not that the workplace safety and insurance system has nothing to learn from "At*hey*". The reverse is in reality the truth.

More troubling is the growing tendency to incorporate certain and limited elements of the tort liability regime into the workplace safety and insurance system. This is a mistake.

This is a mistake that, in my view, provides a false confidence which will lead to unfair results. Workplace safety and insurance, long ago, abandoned core tort principles. Workplace safety and insurance and tort indeed are cousins. Workplace safety and insurance is an offspring of the tort system. But negligence is the heart and centre of tort liability. Cases like "*Athey*" are used to assess causation in a negligence regime – a very different legal framework. In tort, an evidentiary burden must be proved or disproved by the parties involved. As workplace safety and insurance is an inquisitorial process, and not an adversarial one, the investigative process is, to a large degree, out of the control of the individual employer. And rightly so.

However, an avoidance of a discovery type and intrusive type of tort liability inquiry scheme in workplace safety and insurance is only possible when the system, by design, departs from the processes required by the tort liability scheme.

While the ODAP report suggests that there is no burden of proof on either party in the Ontario workplace safety and insurance system, this remains true only if the design and administration of this system supports that founding concept. The system works only if the evidence presented, or obtained by the WSIB, establishes an employment causation. In other words, whether there is a technical legal onus on a worker is a moot point.

A clear burden of proof is needed to avoid intrusive investigations

The onus is on the Board to establish an employment linkage. Without that onus this system spins apart. If employers are expected to compensate workers for occupational diseases where there is only a tenuous relationship to the employment, employers must be provided with the same intrusive, investigatory powers as we see in the tort system to explore non-occupational links. This would be a mistake. Establishing a clear burden to establish a causality with the Board ensures legal fairness, and this cannot be removed.

The Canadian experience

Most Canadian jurisdictions face the same conundrum as those of the Ontario system. Most adjudicate claims, at least in principle, and at least from the stand point of statutory design, in the same way. You will find when you examine case-by-case dispensation, and the law across the provinces, there is wide and varied approach. Legal words are not interpretated and applied in precisely the same manner.

There are two stark and significant departures in the Canadian systems and that is Manitoba and Prince Edward Island. In 1999, the Royal Commission on Workers' Compensation in British Columbia rejected both of the approaches endorsed by those provinces. Manitoba supports a predominance approach and P.E.I. apportionment with predominance.

While the Royal Commission, which only which dealt with occupational disease in a small part of chapter four of its report, (in the part dealing with work relatedness), rejected it. I understand that.

Predominance or apportionment do not address the question of worker fairness

One of the pitfalls of both predominance and apportionment is that the fundamental question of fairness, in a system design context, is not addressed. The dilemma described by Weiler twenty-five years ago is not resolved.

Arguably either approach allows for some legal symmetry, however, unless and until there is a social safety net for the cases that do not rise to the predominance test, or for which only a minimal portion of entitlement is deemed compensable, disabled workers struck down from working due to disease, whether caused by work or not, will be left to their own financial devices. As social policy that is not progress.

On the other hand, so long as workplace safety and insurance for occupational disease is 100% employer funded, it is reasonable to expect at least the employment was the predominant cause before significant expenditures are made.

No matter the legal system, no matter the legal test, so long as the employers are the exclusive funders, fairness will never be achieved.

In the Ontario system, a claimant 100% disabled due to occupational disease, is either all the way in or all the way out of the system. There is no apportionment. Contrary to some who think that the Ontario system allows for apportionment under some circumstances, it does not. The jurisprudence is clear, the policy is clear, the statute is clear. Occupational disease is compensated completely or not at all. Unless and until there's a complimentary and mandatory insurance regime to compensate for non-occupational loss, apportionment is not an attractive solution.

A de facto employer funded universal disability scheme ignores employer fairness

However, a *de facto* employer funded universal disability scheme for occupational disease for employed persons is equally unfair. While the weighting of loss of benefits against the cost of those benefits may not be an entirely equal comparison, and the system if it must err should err to the favour of the diseased worker, such design choices are hardly sound public policy.

It is time for a new way

It is time to forge a new and better way. While I remain of the firm view that the ODAP recommendations must be rejected, the debate must continue in earnest.

Acceptance of the material or significant contribution test, as recommended by ODAP, presents the very real and likely risk that the system will morph into an employer funded universal disability scheme. This evolution, in my respectful view, is inevitable if the legal structures are to remain as they are. Weiler, in his first report, intimated as much,

however suggested that no matter how inclusive the scheme became, it could never compensate for all occupational disease.

However, a simple rejection of the ODAP report is irresponsible, short sighted and simply delays the true and needed debate. A call to reject the ODAP report, without a workable alternative, will likely fall on deaf ears and rightly so.

The modern debate on occupational disease compensation was initiated by Weiler twenty-four years ago. It was briefly addressed in the early 1990s but has been stalled for the last ten years. It is understandable why it was stalled. There were other priorities.

In the 1980s the system was consumed with establishing a higher standard of worker equity and in the1990s energy was focused on a funding crisis.

At the moment there is neither a funding or an equity crisis. While contemplating massive policy reform is always an exhaustive process, as you would know as well as, if not more than I, there likely there will be no better time than now to get on with the real debate – the underlying social contract.

It is time to assess the underlying social contract

The time has arrived for bold, new steps. The prevailing issue is one of funding not adjudication. The WSIB, at any level, lacks the jurisdiction to resolve the dilemma of occupational disease.

To repeat my opening comment - the debate is not about creating a new cost for occupational disease compensation. Disabling diseases already cost. The debate is about who bears the cost. Disease though, tests the limits of the Ontario workplace safety and insurance system.

This is not an easy issue and there is no easy solution. However, so long as employers and workers continue to agree on the basic tenants that underlie the workplace safety and

insurance system, worker and employer interest must, and I'm optimistic and will say "will" intersect on issues of fairness and principle. Once it is admitted that the occupational disease question is not resolvable under the current system, the next step becomes clearer.

A new way must emerge – the status quo is a "no go"

A new way must emerge. The status quo is a no go. A process beyond Weiler was needed in 1980 to marshal his viewpoint forward. That didn't happen. A process beyond the Task Force was needed in 1993 to marshal those views beyond the Task Force. That didn't happen. A process beyond ODAP is needed in 2004.

The question of compensation for occupational disease requires the leadership and stewardship that is only possible from the government and ultimately from the legislature.

Those are my opening commentaries and I'm open for questions.

Chair: By fourteen minutes. Thank you very much sir. It was a very interesting presentation. You say that to implement the ODAP report pushes the system towards universal disability schemes paid by employers and so you're saying I think push go the other way and get away from the workers' compensation model funded by employers and go for some sort of other income support program model funded in the general tax system I guess somehow okay.

LAL: Funded collectively. Once you resolve the problem of providing compensation, once that problem is looked after, once somebody who is employed becomes diseased and unable to work, it adds some form of income support and a multitude of opportunity there to explore, through government programs, through a public-private partnership. A whole host of alternatives are available. But once that (worker entitlement) is assured, then apportionment makes sense. Then it's workable. I'm not suggesting in the least that employers get off the hook for occupational disease caused by employment. They

shouldn't and that would go against the basic tenets of this system established long ago. That made sense then and that still makes sense now. You want to hold employers to account for disease caused by employment. Whether it is fault or not is completely irrelevant. You want to hold them to account. At the same time, you do not want to hold employers to account for a cost that does not arise from the employment. And once you are no longer faced with a decision of "all the way or all the way out", the worries that the ODAP was focused on disappear. They go away.

Chair: Sitting here and thinking about what you're saying and going in the direction of some other kind of income security program, I could see one of the arguments for being substantiate this would this would be without employers paying a substantial reduction in the cost of adjudicating an occupational disease claim today.

LAL: As you know, the adjudication process for some of these claims last for years and years and there are costs involved in that. Many of them require epidemiological studies that are paid for, and some of these things cost millions of dollars. And I haven't seen overall figures but I suspect that the cost of adjudicating claims overall at the Board for occupational disease is much higher than it is for regular claims. It is safe to assume transaction cost for OD cases significantly outpace transaction cost for accident cases.

Chair: Okay so but under your scheme you don't save any of those cost because you've still got to go to occupational causation.

LAL: Well, that's right.

Chair: All you're saving is you're diverting some of the coverage of those cost to another stream. Those costs aren't saveable though.

LAL: With respect, you don't want to save those costs and I'll explain why. You do not want to stop the investigation of linkage to disease to occupational exposures. That has to continue. That will continue whether or not there's any employer accountability for occupational disease.

Chair: OK.

LAL: Because the model has a prevention focus. So, the cost of those studies, those efforts of science that continue progress, that proceeds, and the system is the beneficiary of that. Science, even now, isn't created so that we can adjudicate cases. This is created so that we can establish causality to avoid incidence.

Chair: OK, now you've what you've going to have a third-party paying part of the cost now. So….

LAL: That's correct.

Chair: That's correct so let's say I'm a worker and you're the employer I rather claim against you and we all agree that I'm sick and we all agree that part of my illness is caused by work

LAL: Right

Chair: But, we're going to debate how much. Is it 25%, is it 75%?

LAL: Right

Chair: There's a third part that that they're going pay and the rest of the cost will be borne by this other group.

LAL: Right.

Chair: Now, how do you get that third party to the table or you or I just going to cut a deal because we've got a third party paying?

LAL: No, the Board still has a role as adjudicator. The Board, or something, is still adjudicating and answering those questions. But let's not let's not get too wrapped up in that particular problem because the fundamental question, the fundamental policy

concern first and foremost, is compensating workers. That's the first concern. Under the current system, in untold number of ways, workers get paid and then there's behind the curtain debate with respect to accountability. That happens all the time. That happens with respect to things like "second injury and enhancement fund" that happens with respect to third party transfers, that happen to things like transfer of cost. Those types of transactions - "behind the scene" cost allocation exercises are common place in the workplace safety and insurance system as it exists today. And that will continue. My proposition is not interested in eliminating transaction cost for occupational disease.

Chair: I understand that now.

LAL: If that's what we want then that's easy. That becomes easy. Then you just have some type of general funding. You don't worry about it, you don't worry if it's occupational cost, not occupational cost. We don't want that. You still want to worry about if it's an occupational cost because we don't want workplaces causing disease.

So, we still want to worry, we still are going to worry about that regardless as to what the funding arrangements are. But what you don't want is that debate to be fundamental to the determining the eligibility for benefits. Under the current system, you have two policy choices, in my respectful view. The system overall can do one of two things. It can overcompensate occupational disease or it can under-compensate occupational disease. I suspect that we're in the midst of a paradigm shift. We're in the midst of a paradigm shift that has been evolving over the course of probably two decades and certainly a decade and a half, from a regime of under compensation to a paradigm shift of overcompensation. That was predicted by Weiler. That makes sense as the system wants to be more inclusive as we go forward, and that's eventually what's going to occur. Transaction costs are not insignificant but they are not the over-riding cost of the system. If the benefit costs grow in the level and magnitude that even the Workplace Safety and Insurance Board at some very senior levels in the past several years have suggested, then this will morph into a very real problem. And it may be of sufficient power to undercut the integrity of the Ontario workplace safety and insurance system itself. If the system becomes financially unsustainable, then the system will morph into something else. I

know that will be a mistake. I think that generally its a pretty good system. It has stood the test of time. Its almost a century old. You know, 2014 it its hundredth birthday party and I think that there are some good essential elements of it. But this issue akin to placing a round peg in a square hold.

Chair: Well, I mean I've been I've been sitting here for three weeks or three years depending how you count this ODAP thing and learned that it's a, you know, it's a very difficult problem. This isn't the very first time anybody's gone at it. You've given me some excellent ideas as food for thought. I think they do need a lot of thought because while this might be a swamp sometimes you know there maybe even a worst swamp somewhere else. And before you decide to get out of it, you want to know where you're going to go. And the idea of a new payment structure somehow is I think has labour brought this up too. In different ways than you do but they've made the same point. The burden on the system is if everything is going in the direction that you say it's going to go inevitably and labour wants it to go it's going to put a much more added burden on the system and that burden could be intolerable for certain participants in the system. And, therefore there must be a way of shifting the burden. The question is who do you shift it to and how. And you have some thoughts on that they have some thoughts. If I don't know whether we can go if when I'm doing my final report whether I can go much beyond a philosophical observation of this is going to happen. But then you come back what are you going to do in the short term. Are you going to say don't do anything don't change anything until you've figured this out. I mean or in the short term either you know life will go on and the mandate of this ODAP process is its mandate. Or give us a reference and that's sort of the framework I still have to operate within

LAL: I understand

Chair: And, the Board you know has to receive this and get on with life and so on.

LAL: Let me just conclude a few more with what I hope will be perceived to be some wise cautionary terms. Should a crisis present itself, a solution will be found.

Crises always attract solutions.

It would be a shame that this system is unable to adjust the architecture in the absence of a crisis. Historically, that has been true. Historically, the Ontario workplace safety and insurance system moves forward only when the forest is ablaze - it does not move forward through its own internal initiatives.

There are a lot of reasons for that. This is now called the "Workplace Safety and Insurance Board". There has been a big focus on insurance. This isn't an insurance scheme. This is a program that manages an underlying social contract. Insurance is a tool that allows it to be managed. But you could do it without insurance. Insurance isn't universal in this scheme. There are people who aren't paying insurance premiums and the system is proceeding along quite well for them.

But it would be a shame if progress is not made right now, for we are at, in my respectful view, a unique point. At this moment, although there are challenges facing this system, as there always will be – there are funding challenges right now, as we know with respect to the debate going on regarding funding strategies. We've seen some blips in the Board's investment performance etc. But there is no momentum to these transitory problems.

There is an opportunity here. Weiler was born out of a tremendous social discontent with the system.

There is an opportunity here and it would be a shame to squander that opportunity to present an opportunity to change the architecture in absence of this system reaching critical mass. The Board can't do it. It's beyond the jurisdiction of the Board. The problem with this system is that there is an expectation that the Board assumes the role of legislator and it can't. That's been a problem since the mid 1980s. That political expectation has persisted. It's not the role of the Board. This debate is a larger debate - it's a social debate, one that is political in content, and one that is about the same social

contract that underpins, that flows underneath this regime, this scheme, and upon which the foundation of this whole system is built.

A new social contract is what is required. The current social contract, with the respect of the majority of the system, I think is sustainable, remains supportable, and can stand the continued test of time.

The contract with respect to occupational disease cannot. This one has to change. This is now the time for some bold steps.

My suggestion is that this report be used for that - create a renewed focus on a long-standing pressing issue, then capitalize on that focus. It would be a mistake, I respectfully suggest, to cut the forward momentum of that process by coming up with a "band aid" and say "well that's good enough for now". And, we all move on, we forget about it for another ten or fifteen years.

Of course, it won't be good enough for now. It is time to use this as an opportunity to catapult forward. That's the value of the ODAP process in my view. The ODAP process has reignited interest in this debate that otherwise, in my view, would not have happened until and unless there's a real equity crisis or funding crisis. One or the other. I think we would hit a funding crisis before we hit an equity crisis because that's the way the system is morphing.

Even if ODAP was silent, even if there was no ODAP, I still think that the system would morph into an employer funded universal disability scheme. ODAP isn't going to push it there any faster. But the ODAP process can now capture the essence of this debate and move it forward to where the power really rests and that is to the elected officials of the province of Ontario.

Chair: Thank you very much for your thoughtful and unique presentation. I quite enjoyed it. Good. Thank you.